

EXHIBIT E

Amended
Confidential—Subject to Court Order

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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: **DEFENDANTS' SUBMISSION**
FEDERAL HOUSING FINANCE AGENCY, etc., : **FOR JULY 31, 2012 HEARING**
Plaintiff, :
v. :
UBS AMERICAS, INC., et al., :
Defendants. : 11 Civ. 5201 (DLC)
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FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6188 (DLC)
JPMORGAN CHASE & CO., et al., :
Defendants. :
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FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6189 (DLC)
HSBC NORTH AMERICA HOLDINGS, INC., et al., :
Defendants. :
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FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6190 (DLC)
BARCLAYS BANK PLC, et al., :
Defendants. :
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FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6192 (DLC)
DEUTSCHE BANK AG, et al., :
Defendants. :

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6193 (DLC)
FIRST HORIZON NATIONAL CORP., et al., :
Defendants. :

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6195 (DLC)
BANK OF AMERICA CORP., et al., :
Defendants. :

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6196 (DLC)
CITIGROUP INC., et al., :
Defendants. :

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FEDERAL HOUSING FINANCE AGENCY, etc.,	:	
Plaintiff,	:	
v.	:	11 Civ. 6198 (DLC)
GOLDMAN, SACHS & CO., et al.,	:	
Defendants.	:	

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6200 (DLC)
CREDIT SUISSE HOLDINGS (USA), INC., et al., :
Defendants. :

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6201 (DLC)
NOMURA HOLDING AMERICA, INC., et al., :
Defendants. :

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6202 (DLC)
MERRILL LYNCH & CO., INC., et al., :
Defendants. :

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FEDERAL HOUSING FINANCE AGENCY, etc.,	:	
Plaintiff,	:	
v.	:	11 Civ. 6203 (DLC)
SG AMERICAS, INC., et al.,	:	
Defendants.	:	

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 6739 (DLC)
MORGAN STANLEY, et al., :
Defendants. :

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 7010 (DLC)
ALLY FINANCIAL INC., et al., :
Defendants. :

FEDERAL HOUSING FINANCE AGENCY, etc., :
Plaintiff, :
v. : 11 Civ. 7048 (DLC)
GENERAL ELECTRIC COMPANY, et al., :
Defendants. :

Plaintiff has attempted to prevent discovery of relevant information, including through its refusal to testify about most topics in Defendants' June 28 Rule 30(b)(6) notice (the "Notice"). Despite having agreed to early Rule 30(b)(6) depositions for the purpose of identifying appropriate ESI custodians (*see* June 7 Rule 26(f) Report at 6) and despite the absence of burden, Plaintiff indicated that it would seek a protective order rather than provide even the *identities* of certain individuals and the responsibility of groups other than the "private label" or "non-agency" departments of the GSEs (collectively, "PLS") with knowledge concerning, *inter alia*, the same loan originators (the "Originators") involved in the securitizations at issue (the "Securitizations"). Similarly, Plaintiff refuses to respond to Defendants' Interrogatory No. 3, which seeks the identity of employees responsible for the GSEs' direct relationships and dealings with the Originators.

Significantly, Plaintiff concedes that information concerning the Originators is discoverable—regardless of whether it pertains directly to the Securitizations—if it was communicated to the GSEs' PLS personnel. Plaintiff contends, however, that "the knowledge possessed by people other than (1) the specific individuals at the GSEs who were involved in the Securitizations, or (2) any employees who had an obligation to provide information to those individuals concerning the transactions in issue, is irrelevant."¹

Fraud claimants and plaintiffs alleging D.C. blue sky claims must prove not just that a certain decision maker relied on an alleged misstatement but that the claimant's reliance was justifiable—which depends on institutional knowledge, institutional resources, and other factors. *See, e.g., HSH Nordbank AG v. UBS AG*, 941 N.Y.S.2d 59, 66–67 (1st Dep't 2012); *Davidson Pipe Co. v. Lavenhol & Horwath*, 120 F.R.D. 455, 460 (S.D.N.Y. 1988). The necessary inquiries into whether Plaintiff was on notice of its claims prior to September 2007, whether it can discharge its burden of demonstrating that any alleged misstatement is material, and whether a Section 11 or 12(a)(2) or Blue Sky claimant traded without knowledge of an alleged material misstatement, among others, also turn on what was known to the claimant's personnel. *N.J. Carpenters Health Fund v. RALI Series 2006-QO1 Trust*, 2012 WL 1481519, at *2 (2d Cir. Apr. 30, 2012) (summary order); *see also Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 2012 WL 1570856, at *8 (S.D.N.Y. May 4, 2012).²

To limit discovery to what a subset of personnel knew based on what other personnel had a duty to report to that subset, Plaintiff relies entirely on one decision predicated on one provision of the Restatement (Second) of Agency, which says that knowledge of an agent is not imputed unless the "agent has a duty to disclose to the principal." *AIG Global Sec. Lending Corp. v. Bank of Am. Secs. LLC*, 2006 WL 1206333, at *1 (S.D.N.Y. May 2, 2006) (Pitman, M.J.) (quoting Restatement (Second) of Agency § 275 (1958)). The Restatement (Second) was superseded by the Restatement (Third) of Agency, however, which reversed the test on which the AIG decision relied, stating that the knowledge of an agent or employee is imputed to the principal

¹ Plaintiff's Amended Objections and Responses to Defendants' Notice of Rule 30(b)(6) Deposition at 9, 18, 25, 29, 32, 33. This same restriction pervades Plaintiff's responses to Defendants' discovery requests, including Defendants' Interrogatories and Document Requests. A list of these and other outstanding discovery disputes accompanies this submission.

² Defendants would be pleased to brief the substantive law that makes GSE knowledge central to the claims and defenses in these actions, including the extensive appellate and other authority addressing these issues.

unless the agent “is subject to a duty to another not to disclose the fact to the principal.” RESTATEMENT (THIRD) OF AGENCY § 5.03. As Comment c explains, “the fact that an organization has structured itself internally into separate departments or divisions does not defeat imputation.” *Id.* § 5.03 cmt. c (2006); *accord George v. Equifax Mortg. Servs.*, 375 F. App’x 76, 78 (2d Cir. 2010) (knowledge acquired by employee and imputed to corporation is imputed “to all of its departments”). For example, under Illustration 9, where an employee in the credit department of a bank learns of a restrictive covenant applicable to a borrower but “does not communicate” that information to the loan department, which makes a loan to the borrower in violation of the covenant, “knowledge [of the covenant] will be imputed” to the bank. *Id.* § 5.03 illus. 9. Thus, whether information known by one employee was actually communicated to another employee – a condition FHFA unilaterally imposes on defendants’ right to discovery – is irrelevant.

Defendants recognize that in some cases a duty to maintain walls or other facts may bear on whether an institution had certain knowledge or intent. Here, however, Plaintiff has presented no rationale for its position other than that some “walls” aimed to limit some information flow between the GSEs’ PLS and Single Family Mortgage Businesses (“Single Family”). Those so-called “walls” were not designed to block information flow and should not cut off discovery about that information. Accompanying this submission is an initial collection of documents, mostly statements by the GSEs themselves, reflecting that each GSE operated its lines of business on an “integrated,” “complementary” basis, under common leadership, risk management and regulatory scrutiny. (Tabs 6 (FNM), 2, 4 (FRE).) Fannie Mae, for example, launched a “One Fannie Mae” initiative aimed at promoting “a cross-functional approach to risk management and controls.” (Tabs 5 (FNM), 6 (FRE).) This initiative was led by the “Single Family Counterparty Risk Management” (“SF CPRM”) division, which was charged with “managing the counterparty risk (from issuers, master servicers, servicers and originators) of private label securities purchased by Fannie Mae.” (Tab 3 FNM.) Another group, the “Private Label Advisory Team” (“PLAT”) at Fannie Mae provided “coordination and oversight” of the activities related to Fannie Mae’s portfolio, with input from all business units, including “officer level members (or designees)” from Single Family. Freddie Mac likewise “established the Enterprise Risk Management Committee” “to permit management from various business areas, as well as the risk function, to meet regularly . . . specifically to monitor and oversee credit approval processes, market practices, market trends and credit risk being taken on by the Company.” (Tab 4 (FRE).) In addition, as Cynthia Simantel (a former Countrywide executive) states in her declaration, the GSEs’ whole loan and PLS businesses conducted coordinated reviews of originators and servicers. (Tab 9 (FNM).)³

Accordingly, Defendants respectfully request that the Court compel Plaintiff to testify as to each of the topics contained on Defendants’ Notice; identify personnel responsible for dealings and relationships with Originators, in response to Interrogatory No. 3; and produce documents and information relating to GSE institutional knowledge.

³ “It is well-settled within this Circuit that [Rule 26(b)(1)] will be satisfied if there is ‘any possibility’ that the information sought may be relevant to the subject matter of the action.” *Lyondell-Citgo Ref., LP v. Petroleos de Venez., S.A.*, 2004 WL 2698218, at *2 (S.D.N.Y. Nov. 19, 2004) (citations omitted). This well-established rule applies with even greater force here, where the GSEs systematically destroyed ESI throughout the relevant time period, as described in Tabs 1-9 (Document Retention). Plaintiff has refused to confirm that any of the custodians whose files it proposes to search even possess any ESI, and has refused to provide Defendants with information concerning the scope of any litigation holds that were issued during the relevant time period.

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